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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-188

AHTO WALTER,

Petitioner,

v.

NETHERLANDS MEAD, N.V.,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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The Court of Appeals concluded that, under the special facts of this case, statements made by plaintiff in his complaint and adhered to in his pretrial statement had estopped plaintiff from later contending otherwise.

QUESTIONS PRESENTED

1. Whether Petitioner is barred from raising questions 1 and 2 of the Questions Presented in his Petition, because Petitioner failed to make timely argument about the Federal Rules of Civil Procedure in the Court of Appeals.

2. Whether the Court of Appeals decided any issue of importance to a proper interpretation of the Federal Rules of Civil Procedure.

3. Whether the application of equity principles of estoppel to the unique facts of this case presents an important federal question which should be answered by the Supreme Court.

STATEMENT OF THE CASE

For purposes of this brief, Respondent relies upon the statement of facts made by the Court of Appeals in its opinion (see Petition, Appendix C, pp. 30a-34a).

ARGUMENT

I. PETITIONER DID NOT PROPERLY RAISE A QUESTION ABOUT THE FEDERAL RULES OF CIVIL PROCEDURE IN THE COURT OF APPEALS.

The first two questions of Petitioner's "Questions Presented" should be rejected without further consideration because they were not raised in a timely manner in the Court of Appeals.

Petitioner's arguments about the Federal Rules of Civil Procedure were not briefed or argued orally to the Court of Appeals before that court decided the case.

Issues presented to this Court

> "must have been urged and briefed below (*California v. Taylor*, 353 U.S. 553, 557, n. 2; *Lawn v. United States*, 355 U.S. 339, 362, n. 16; *Neely v. Eby Construction Co.*, 386 U.S. 317, 330). It is not enough that the opinion below may have men-

> tioned and discussed a matter not properly raised (*Tyrrell v. District of Columbia, supra* [243 U.S. 1]). * * *"[1]

Petitioner did not raise a Federal Rules question until he filed a petition for rehearing en banc, after the Court of Appeals' decision of which review is now sought. Even then, the "Required Statement of Counsel for Rehearing In Banc" certified Petitioner's belief that the court's decision was contrary to Rules 7, 8(d) and 54(c), and thus the other rules (8(a), 8(c), 8(f) and 15(b)) invoked here by Petitioner were at no time properly argued to the Court of Appeals. The Court of Appeals, without permitting your Respondent to be heard on the issue (see Rule 40(a) of Federal Rules of Appellate Procedure), denied rehearing without opinion, other than the statement that a majority of the circuit judges had not voted for rehearing (Petition, Appendix C, p. 58a). Thus, the Court of Appeals never decided the merits of Petitioner's untimely Federal Rules arguments.[2]

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[1] Stern & Gressman, Supreme Court Practice §6.37 (4th ed. 1969).

[2] In its opinion, the majority of the three-judge court referred to an argument about the Federal Rules by the *dissenting judge*, but explained that those Rules had no bearing on the majority's analysis of the case. See Argument II, *infra*. Under the rule of Tyrrell v. District of Columbia, *supra*, that kind of discussion, without argument by a party to the litigation and opportunity for rebuttal argument by his adversary, is not enough to preserve the issue for review here. Indeed, it can be presumed that the petition for rehearing was not entertained by the Court of Appeals because the new issue should not have been raised in a petition for rehearing:

> "* * * One seeking a rehearing will not ordinarily be permitted to set up new grounds in support of his petition different from those urged by him on the original hearing. Reece Folding Machine Co. v. Fenwick (C.C.A. 1) 140 F. 287, 2 L.R.A. (N.S.) 1094; A.F. Withrow Lumber Co. v.

(continued)

II. THE COURT OF APPEALS DID NOT DECIDE ANY QUESTION OF EITHER GENERAL OR SPECIAL IMPORTANCE TO A PROPER INTERPRETATION OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Petitioner contends that "this case involves an important question of the interpretation of the Federal Rules of Civil Procedure . . ." (Pet. at 5). We contend that no question about the Federal Rules is raised by the decision of the Court of Appeals — that the first two of Petitioner's "Questions Presented" and his assertion of "Federal Rules of Civil Procedure Involved" are specious. The Court of Appeals majority specifically stated that its decision in this case did *not* turn on an interpretation of the Federal Rules (Petition, Appendix C, p. 48a n. 28):

> "28. Due to the steady accrual of interest from September 1963, when the Complaint was filed, the estoppel we find would have arisen with equal force if Walter's statements had been made to Mead out of court. The estoppel found in this case arises from statements in the pleadings only because, after the collapse of their relationship, Walter's communications to Mead were solely through the medium of papers filed in this district court action. Since the estoppel did not arise from the complaint as a pleading, but only from the

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[2] (continued)

Glasgow Inv. Co. (C.C.A. 4) 106 F. 363; United States v. Hall (C.C.A. 1) 63 F. 472."

Marion Steam Shovel Co. v. Bertino, 82 F.2d 945, 947 (8th Cir.), *cert. denied*, 299 U.S. 556 (1936). *Accord*, Partenweederei, Ms. Belgrano v. Weigel, 313 F.2d 423, 424 (9th Cir.), *cert. denied*, 371 U.S. 830 (1962); United States v. Walton, 411 F.2d 283, 292 (9th Cir. 1969) (concurring opinion); *cf.* Cummings v. Redeeriaktieb Transatlantic, 242 F.2d 275 (3d Cir. 1957).

complaint as a communication of Walter's position to Mead, we find the dissenting opinion's reliance on the Federal Rules of Civil Procedure to be misplaced. This is especially true in a case such as this, where the defense normally includible in the answer has been anticipated in the complaint. See notes 19 and 25 above.

"The plaintiff's statement of issues (pages 15-16 [Petition, Appendix, pp. 43a-44a] above) was submitted pursuant to paragraph 4 of the district court's May 19, 1969, Pre-Trial Order. The plaintiff should, therefore, have been limited to the issues included in his statement, absent an order of the district court allowing the plaintiff to amend his statement. See *Ely v. Reading Co.*, 424 F.2d 758, 763-64 (3d Cir. 1970); *Southard v. Independent Towing Co.*, 454 F.2d 1115 (3d Cir. 1971); *Payne v. S.S. Nabob*, 302 F.2d 803 (3d Cir. 1962); F.R. Civ. P. 16. *** It is noted that no order was entered by the district court expanding the issues to be considered on the ground of 'manifest injustice' or any other ground. In view of the accrual of interest from 1963 to the present, it seems clear that there is more injustice to the defendant, who failed to make payment in reliance on a proper discharge, than to the plaintiff, whom the trial judge made the beneficiary of a suggestion he [the judge] advanced first near the end of trial."

Thus it was that the Court of Appeals relied upon traditional principles of equity in holding that Petitioner Walter was estopped from contesting the validity of the redemption demand made by Respondent. There is no precedential value in the court's opinion with respect to any

of the Federal Rules which Petitioner claims are involved.[3] Unlike many other cases coming to this Court which require it to decide first what the lower court has actually done, this case is made simple by the manner in which the Court of Appeals majority has explained what is and is *not* the basis of its decision.

III. THE COURT OF APPEALS DID NOT DECIDE ANY OTHER IMPORTANT FEDERAL QUESTION.

It is clear that the opinion below cannot be used as precedent except in the limited area of equitable estoppel, a doctrine which requires that each case be examined on its special facts[4] and which has been left to the lower courts to elaborate upon in the absence of a conflict in the circuits; significantly, neither the parties nor the Court of Appeals has relied upon any opinion of the Supreme Court in discussing the estoppel point.

Therefore, questions 3 and 4 of the Petitioner's "Questions Presented" are not important federal questions calling for review here.[5]

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[3] As quoted above, the Court of Appeals did cite Rule 16 and case law (the use of which were not challenged by either the dissenting judge or the Petitioner here) to support the point that the plaintiff's pretrial statement of issues was a binding reaffirmation of the same position taken by plaintiff some six years earlier in his complaint.

[4] Scarano v. Central R. Co. of N.J., 203 F.2d 510, 513 (3d Cir. 1953); Galt v. Phoenix Indemnity Co., 120 F.2d 723, 726 (D.C. Cir. 1941); Scott County Ark. v. Advance-Rumley Thresher Co., 288 F. 739, 750 (8th Cir. 1923).

[5] Moreover, the case was decided correctly on the estoppel grounds, for the reasons stated in the opinion of the Court of Appeals (see Petition, Appendix C, pp. 40a-49a).

CONCLUSION

The Petition for Writ of Certiorari should be denied with respect to Questions Presented 1 and 2, because those questions were not timely argued before the Court of Appeals. Further, upon the merits, the Petition should be denied with respect to all Questions Presented, because the decision of the Court of Appeals in this case does not present any important federal question which should be settled by this Court, and that decision is not in conflict with any decision of this Court or with any decision of another circuit court.

Respectfully submitted,

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